process requires that the rules for litigation be fixed in advance, be made known to the litigants, and then not be altered on a case-by-case basis so as to achieve a pre-ordained outcome.

The Court of Appeal's nullification also denied Petitioners the equal protection of the law as guaranteed under the Fourteenth Amendment to the U.S. Constitution. The rules of procedure must be the same for all litigants of the same class. That is what the California legislature intended when it enacted the subject statutes. However, in this case the California Court of Appeal refused to enforce the rules of civil procedure governing the filing of a cross complaint, refused to enforce the right of each party to submit a brief on issues that are determinative of an appellate court's decision, and ignored its lack of subject matter jurisdiction over the question central to its decision. Meanwhile, litigants in other California cases have been able to rely upon the provisions of these statutes in prosecuting their actions.

Petitioners do not know how frequently courts nullify statutes by refusing to enforce them. Petitioners only know for certain that it has happened twice in this case to their severe detriment. There are only a few reported decisions that directly discuss the concept of nullification, and thus far, Petitioners cannot find any example as extreme as that in this case. Petitioners suspect that the problem is very similar in frequency to the mis-use of prosecutorial powers such as addressed by this Court in *Banks v. Dretke* 540 U.S. 668 (2004). Although not a daily occurrence, it is such a serious transgression of the rules of jurisprudence that this Court should address the issues presented here and enunciate a bright line rule that will hereafter be a simple, clear guide to all courts.

B. **The California Court of Appeal Refused to Enforce the Provisions of CCP §428.50 Without Proper or Just Cause.**

CCP §428.50(a) requires that a cross complaint against a party to an action be filed at the time of the answer. The Levens failed to file any cross complaint against the Terrys by this date. Pet. App. at A10, A25, A39. CCP §428.50(b) requires that any other cross complaint be filed at any time prior to the setting of the trial date. The Levens failed to file any cross complaint against the other Petitioners by this date. Pet. App. at A10, A25, A39.

In the event that a party is unable for any reason to meet the statutory deadlines under CCP §428.50(a) or (b), the statute contains a "cure" provision under CCP §428.50(c) that permits the filing of a cross complaint after the granting of "leave of court" in the "interest of justice at any time during the course of the action."

There is only one published decision in California interpreting this statute that is pertinent to the facts of this case. In *City of Hanford v. The Superior Court of Kings County* 208 Cal. App. 3d 580 (1989) (hereafter "*City of Hanford*"), the Court of Appeal interpreted the language in subsection (c) to mean that a litigant has until the entry of a final judgement to make a motion for leave to file a cross complaint. If no such motion is filed before the entry of final judgement, the statute's time requirements under subsections (a) and (b) are a permanent bar.

The Levens never filed a motion for leave to file a cross complaint before the entry of final judgement in the Original Action. Pet. App. at A10, A39. Moreover, the Levens never filed a motion for leave of court before filing a

cross complaint almost four moths after entry of final judgment. Pet. App. at A10, A39. Thus, it is self evident that the Levens never met the mandatory requirements of CCP §428.50(a)&(b), or even attempted to satisfy the cure provisions of subsection (c).

The Levens never filed a cross appeal at the conclusion of the original action challenging any action of the trial court. Further, the Levens never raised as an issue in their opposition brief on appeal of the Original Action (Appellate Case No. 103827) any question that the trial court had acted in a manner that was prejudicial to them.

In their appeal of the trial court's dismissal of the cross complaint as untimely filed (Appellate Case No. 106673), the Levens never raised any argument that they were or might have been prejudiced by the trail court's Trial Date Order or the Severance Order. Indeed, in their opposition to the petition for review by the California Supreme Court filed by the Petitioners, the Levens admitted that they had requested the Severance Order and that they were never prejudiced by the Trial Date Order or the Severance Order. Pet. App. at A60-61.

The Trial Date Order and the Severance Order were both issued on March 14, 2003. The trial did not start until July 21, 2003. That is a period of over four months in which the Levens could have made a motion for leave to file the cross complaint under CCP §428(c), which the trial court would almost certainly have granted. The Levens simply did nothing to preserve any cross complaint. Legal counsel on both sides were bound by the same rules of civil procedure and these rules should be applied equally. CCP §428.50 is, in effect, a stature of limitations for bringing cross complaints. Setting the length of time for a statute of limitations is a legislative function, not a judicial function.

This was not a situation in which the Court of Appeal could properly refuse to enforce a valid expression of legislative intent.

The California Court of Appeal disregarded the legislature's determination of what is a "just" time period for fling a cross complaint under CCP §428.50, and in its place, substituted its own view of what was "just". However well intentioned this might have been on behalf of the Levens, the Court of Appeal had no legal basis for substituting its personal views for the law as determined by the legislature. This judicial nullification was a gross violation of the Petitioner's due process rights under the Fourteenth Amendment.

The Court of Appeal's action was grossly prejudicial to the Petitioners, who had followed all of the rules of civil procedure, had just been forced to go through a trial without the benefit of any meaningful discovery, and had properly and successfully followed the rules of civil procedure for striking the cross complaint as untimely filed. Both sides were supposed to be following the same rules of civil procedure. Both sides were obligated to know what those rules were. The Court of Appeal's action denied Petitioners the equal protection of the law under the Fourteenth Amendment by not enforcing the rules of civil procedure equally in this case.

C. The Fourteenth Amendment's Due Process and Equal Protection Clauses Should Prohibit Judicial Nullification of Valid State Laws of Judicial Procedure.

The Petitioners have nof found any federal court decision applying either the Due Process or the Equal Protection of Law Clause of the Fourteenth Amendment to

the action of a state court nullifying, by refusing to enforce, an otherwise valid state code of civil or criminal procedure. The Petitioners believe that the lack of relevant decisions reflects the obvious fact that the principle of judicial nullification has been so conceptually repugnant to every court in this country that they have seldom engaged in this type of *ultra vires* behavior.

Judicial nullification has been specifically considered and rejected in the context of enforcement of a federal statute in a federal court action. The decision in *Sorrells v. United States* (1932) 287 U.S. 435 (1932), made it very clear that the U.S. Supreme Court found judicial nullification a repugnant and *ultra vires act*: "Judicial nullification of statutes, admittedly valid and applicable, has, happily, no place in our system." *Id.* at 450.

The *Sorrels* decision followed the reasoning in another U.S. Supreme Court decision, *Ex Parte United States* 242 U.S. 27 (1916). Here, the U.S. Supreme Court granted a writ of mandamus ordering the Untied States District Court for the District of Ohio to vacate an order indefinitely suspending a prison sentence during good behavior. The opinion by Justice White thoroughly reviewed the common law and the prior state and federal decisions concerning the purported "inherent" power of a court not to enforce a sentence mandated by statutory law. Justice White concluded that: "we can see no reason for saying that we may now hold that the right exists to continue a practice which is inconsistent with the Constitution, since its exercise, in the very nature of things, amounts to a refusal by the judicial power to perform a duty resting upon it."

The California Supreme Court has also ruled that judicial nullification is not to be tolerated in California

Courts. In *Santa Clara County Counsel Attorneys Association v. Woodside* 7 Cal. 4th 525 (1994), which concerned the rights of attorneys employed in a county counsel's office to petition for a writ of mandate to enforce their right to collectively bargain under a state statute, the California Supreme Court found that:

> It appears elementary that courts may not frustrate the creation of a statutory duty by refusing to enforce it through normal judicial means. What public policy reasons there are against enforcement of a statutory duty are reasons against the creation of the duty *ab initio*, and should be addressed to the Legislature.

Id. at 540.

There is one California Court of Appeal decision that has rejected judicial nullification of a civil procedure statute dealing with the time to file that is very analogous to this case. In *Karamzai v. Digitcom* 51 Cal. App. 4th 547 (1996), the California Court of Appeal for the Second District found that a trial court did not have the inherent power to extend or shorten the time for the filing of a request for a trial de novo:

> A trial court does not have inherent or unrestricted power to extend or shorten the time specified by the Legislature in which an act in a civil action must be done. Rather, the court only has such power only to the extent granted by the Legislature.

Id. at 550.

The cases discussed above show that the doctrine of judicial nullification has no place in the federal or California judicial systems. Petitioners are asking this Court to make a clear and unequivocal statement to every court in the country that judicial nullification of a state statute prescribing the rules of judicial procedure is a violation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

This Court needs to make this statement to prevent any court in this country from deciding for itself what rules of judicial procedure it will or will not enforce. Changing the rules of procedure for a particular litigant in one case under the purported guise of "justice" or "fairness" is a structural due process error that denies that litigant the same rules of judicial procedure enjoyed by other similar litigants. Judicial Nullification can never serve the interests of "justice" or "fairness".

The California Court of Appeal in this case believed that it had the inherent power to decide what was "fair" and "just" and that it could ignore express statutes to the contrary. This Court must reverse the California Court of Appeal and instruct it and every court that such arbitrary wielding of the judicial power will not be tolerated in this country.

D. The California Court of Appeal Refused to Enforce the Provisions of California Government Code §68081 Without Proper Cause.

The only basis cited by the California Court of Appeal to support its ruling that the appeal of the cross compliant was "moot" and that the Levens could file a cross complaint in the Original Action was its unsupported

assertion that the Levens "may have" been prejudiced by the Trial Date Order or the Severance Order. The issue of purported prejudice to the Levens stemming from these actions of the trial court had never been raised by the Levens in either of the two appeals. The Levens admitted this in their opposition to the petition for review to the California Supreme Court:

> The Levens never appealed the March 14th 2003 "order" [the Severance Order] because they agreed with it. In fact, they sought it, as the transcript of the hearing makes clear. What the Levens did appeal from was the subsequent order ... striking their cross complaint without leave to amend.

Pet. App. at A60-61.

The record and this admission by the Levens makes it undisputable that the one, central issue that the Court of Appeal used as the basis for its refusal to enforce CCP §428.50, i.e., that the Levens "may have been" prejudiced, was: (1) simply "made up" by the Court of Appeal; and (2) had never been raised on appeal by any party, and thus, had never been briefed by any party.

Petitioners promptly filed for a rehearing based upon a number of grounds, including that California Government Code (hereafter "CGC") §68081 required the Court of Appeal to request and accept supplemental briefing on the issue of alleged prejudice to the Levens resulting from the trial court's Severance Order. Pet. App at. A39.

CGC §68081 is a statute that mandates that any appellate court in California afford any party an opportunity

by supplemental brief to "present their view" on any issue that "was not proposed or briefed by any party" that is or might be material to the appellate court's decision. This statute is really just a legislative statement of the right under the principles of due process for a party to be heard on issues that are material to the decision of a court of appeal. This statute does not create any special privilege for any party or any significant burden on the appellate court. It merely requires the appellate court to give notice to the parties that it is raising an issue *sua sponte* that will be material to the decision of the court that has never been briefed, and therefore, the parties may have an opportunity to submit a supplemental brief addressing the issue before a final ruling is made. The statute is simple, fair, and sensible under the principles of due process and equal protection.

The California Court of Appeal ignored the request by Petitioners for a rehearing. Pet. App. at A28, A40. In doing so, the Court of Appeal refused to enforce CGC §68081 by permitting the Petitioners opportunity to submit a supplemental brief on the issue of whether the Levens "may have" been prejudiced by the Severance Order. The statute makes it clear that supplemental briefing is not optional. But once again, the Court of Appeal ignored what the legislature had determined was fair and just due process and, and in its place, substituted its own opinion.

E. The California Court of Appeal Did Not Have Subject Matter Jurisdiction of an Issue That Was Never Raised on Appeal Under CCP 906 and Its Ruling Based Thereon Violated the Due Process Clause of the Fourteenth Amendment.

The fact that the Levens never raised any issue about being prejudiced by the trial court's Trial Date Order or

Severance Order in either appeal, as they have admitted on the record, means that the issue was never properly before the California Court of Appeal. CCP §906 specifies the subject matter of jurisdiction for appeals in California. The last sentence of CCP §906 denies subject matter jurisdiction to any reviewing court over any "decision or order from which an appeal might have been taken", but was not. The Levens, having admittedly never appealed from the Trial Date Order or the Severance Order, thereby waived any right to appeal those orders. Therefore, the California Court of Appeal did not have subject matter jurisdiction to raise the issue of possible prejudice to the Levens from either the Trial Date Order or the Severance Order. Once again, the Court of Appeal deliberately ignored the relevant California statute determining its ability to decide an issue on appeal. Judicial nullification was simply its *modus operandi*.

The Petitioners, in their brief requesting a rehearing, pointed out the lack of subject matter jurisdiction to the Court of Appeal. The rehearing was denied without comment and without allowing for supplemental briefing of this issue as required under CGC §68081.

The assertion of personal jurisdiction by a state court must meet the Due Process Clause of the Fourteenth Amendment: this has been settled law since *Pennoyer v. Neff* 95 U.S. 714 (1877). However, it appears that this Court has never expressly addressed the question of whether the unfounded assertion of subject matter jurisdiction by a state court is also a violation of the Due Process Clause of the Fourteenth Amendment.

It is axiomatic that any court must have both subject matter and personal jurisdiction. Lack of personal jurisdiction, as noted above, is a fundamental violation of the

Fourteenth Amendment's Due Process Clause. Consistent with this, Petitioners ask this Court to hold that the exercise of jurisdiction by a state court, when it does not have any subject matter jurisdiction as a matter of law, is an equal and parallel violation of the Due Process Clause of the Fourteenth Amendment. To allow a state court to act when it has no authority over the subject matter is as great a violation of due process as when a court acts without authority over the person.

Lastly, the Petitioners point out that it is an obvious violation of the Equal Protection Clause of the Fourteenth Amendment when a state court selectively and improperly decides, on a case-by-case basis, to assert subject matter jurisdiction by ignoring the express language of the state statute of judicial procedure that creates the appellate court's subject matter jurisdiction.

CONCLUSION

What began as small and simple civil action has, through the unconstitutional acts of the trial court for the Superior Court of Solano County, California, and then the California Court of Appeal, First Appellate District, grown into a case of national constitutional importance. While the underlying case is not important to the nation, the basic judicial principles that have been grossly violated are essential to every court in the country.

Indeed, the principles raised by this petition are so axiomatic that it would seem at first glance that it would be unnecessary for this Court to pronounce upon them. Yet, the record in this case demonstrates the necessity for this Court to make these principles ring with the utmost clarity in the minds of every jurist.

Had the concept that judicial nullification was a violation of the U.S. Constitution been understood across the land, perhaps the building codes of Solano County, California would have been enforced at the hearing of March 14, 2003, and this case would have been promptly and properly concluded. But the Court refused to enforce the local building codes, and the Terrys were ordered to present their case at trial without the benefit of discovery.

While the structural due process error of denying discovery to a litigant was corrected on appeal, the problem of judicial nullification arose again when the California Court of Appeal deliberately ignored the express statute forbidding the filing of a cross complaint after the entry of final judgment. When the Court of Appeal substituted its own idea of fairness for the legislature's determination of the time to file a cross complaint, the Court of Appeal violated the structural due process rights of the Petitioners and made them subject to different rules of civil procedure than any other similar litigant.

When the Petitioners objected to this assertion of an inherent power to ignore valid statutes, the Court of Appeal refused, in direct violation of another statute expressly for the purpose, to permit the Petitioners to submit a brief on the issue that was central to the Court of Appeal's decision. This denied the Petitioners their due process right to be heard on an equal basis as all other litigants.

Lastly, the Court of Appeal ignored the state statute limiting its subject matter jurisdiction to judgements or orders from which appeals are taken. The Court of Appeal simply raised the determinative issue by itself in direct violation of the statute defining the appellate court's subject matter jurisdiction. Again, this was a brazen violation of the

Petitioner's due process rights and their right to be treated equally with any other similar litigant.

Petitioners pray that this Court grant a writ of certiorari so that other litigants do not ever have to experience such a repeated violation of their constitutional rights as a result of judicial nullification.

Respectfully Submitted,

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California Rules of Court, rule 977(a) prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

CLYDE TERRY et al., Plaintiffs and Appellants, v. ALAN LEVENS et al., Defendants and Respondents.	A103827_ Solano County Super. Ct. No. FCS 021093

CLYDE TERRY et al., Plaintiffs, Cross-defendants and Appellants v. ALAN LEVENS et al., Defendants, Cross-complainants and Respondents.	A106673 Solano County Super. Ct. No. FCS 021093

These consolidated appeals arise out of litigation relating to the lease of commercial property. As will be seen, the issues raised by the parties in their separate appeals all directly or indirectly arise out of a sua sponte judicial

order setting the case for trial about five months after the complaint was filed and prior to filing of an answer and completion of any meaningful discovery.

In appeal No. A103827, plaintiffs Clyde and Anne Terry appeal the judgment entered against them after a jury verdict on the grounds that the speedy setting of the case for trial on the basis of a calendar preference was statutorily unauthorized and denied plaintiffs due process of law and other rights.

In appeal No. A106673, defendants and cross-complainants Alan and Karen Levens contend that the order granting plaintiffs' motion to strike their cross-complaint without leave to amend was legally unjustified, inequitable, and highly prejudicial.

We shall reverse the judgment in plaintiffs' appeal. As we explain, the remand for retrial we order on that appeal renders defendants' appeal moot.

FACTS AND PROCEEDINGS BELOW

Approximately 20 years ago, plaintiffs designated a portion of property they own in the City of Dixon for use as a commercial boarding kennel and obedience training facility for pet dogs and cats, and obtained the necessary land use permit. Defendants, partners in a dog boarding and training business known as "Alan's Canine Training and Kennel," leased the designated premises for a two-year period commencing April 1, 2001 and ending on March 31, 2003, with an option to renew the lease for an additional five years. Section 3 of the lease agreement states: "The premises are to be used for the operation of board and care kennel for pets and for no other purpose, without prior written consent of Lessor." Section 4 states: "Lessee will

not use any portion of the premises for purposes other than those specified. No use will be made or permitted to be made upon the premises, nor acts done, which will increase the existing rate of insurance upon the property, or cause cancellation of insurance policies covering the property." The lease also requires lessees to comply with all applicable count land use requirements.

An addendum to the lease agreement modified its terms in several ways. As pertinent, the addendum required defendants to "comply with all laws, ordinances and regulations regarding operation of board and care and training and grooming and breeding kennels." It also permitted defendants to park a "self contained" trailer with a "24' max. length"[1] on the premises for use as an office and "occasional overnight use." The addendum provided that defendants "will have the option of holding ...Schutzhund competitions twice a year on the leased property." [2]

On November 27, 2002, plaintiffs filed a complaint in the Solano County Superior Court alleging causes of action for breach of contract and trespass. In addition to termination of the lease, payment of all rent due plus interest, and attorney's fees (as provided by the lease agreement), the complaint also sought a preliminary

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[1] The typed number "24' " was crossed out and replaced by the number "33' " written in script. This change is accompanied by the initials of defendant Karen Levens, and the words: "Snook in after signing."

[2] According to the complaint, the term "Schutzhund" (sometimes in the pleadings and exhibits also spelled "Shutzhund" and "Schuntzhund") "refers to a form of protection training where obedience, scent, tracking, and attack commands are taught in combination." Defendants claim "Schutzhund is a sport," and that dogs trained in this manner are not physically dangerous to others.

injunction prohibiting use of the premises for "attack dog or Schutzhund training" or any other unauthorized use.

The gist of the causes of action for breach of contract are (1) that defendants' regular use of the leased premises for attack dog or Schutzhund training is a hazardous and dangerous activity prohibited by the lease, which by its terms limits use of the premises to the operation of a "board and care kennel for pets;" (2) that defendants moved a 33-foot trailer on the premises, in violation of the provision of the addendum permitting a trailer no longer than 24 feet; and (3) that, in violation of the addendum to the lease agreement (which requires the trailer to be "self contained") and local building and land use codes, and without the necessary permit, defendants installed an electrical line to the trailer. The causes of action for trespass alleged that defendants' placement of the trailer on the property and installation of an underground electrical line and chain link fenced kennels were unauthorized uses of plaintiffs ' property creating fire and health risks.

With the original complaint, plaintiffs' filed a motion for temporary restraining order preventing defendants from engaging in attack dog training on the leased premises and any other activity not essential to the operation of a board and care kennel or not insured, as required by the lease agreement. In their supporting memorandum, plaintiffs asserted that as a result of defendants' hazardous, unauthorized, and uninsured activities on the leased premises plaintiffs were placed at serious risk of irreparable harm, and that defendants lacked the means to compensate them for any monetary damages or costs of defense they might incur in the event of a claim arising from defendants' attack dog training activities. Plaintiffs claimed that defendants' activities also exposed plaintiffs to criminal liability and the loss of reputation and emotional distress such liability would

cause. In response, defendants claimed that Schutzhund training is not "attack dog" training, and that their activities on the leased premises are done in a safe and professional manner. Defendants claimed their activities were covered by an insurance policy but the insurer informed them that policy was being cancelled because plaintiffs' son-in-law, Ken Odom, told the insurer that defendants were conducting attack dog training. Because this information was false, defendants argued, plaintiffs "do not have the 'clean hands' that are required to obtain a temporary restraining order."

Plaintiffs' motion for a temporary restraining order was denied by Judge Michael Nail, apparently on the ground that the existing insurance policy would not expire until January 3, 2003. At some point after January 3, plaintiffs filed a motion for preliminary injunction, which was heard by Judge Franklin R. Taft. On February 7, 2003, Judge Taft denied the motion without prejudice, because defendants had obtained a new insurance policy. Judge Taft had been told by defendants that the new policy was also being cancelled because Ken Odom had told the insurance agent and underwriter that they were training "attack dogs," but that the defendants were seeking a third policy. Judge Taft advised plaintiffs they could seek injunctive relief at such time as no insurance policy was in place, but expressed the view that Odom's efforts to have defendants' policy cancelled might constitute "unclean hands" attributable to plaintiffs and a "wavier of lease."

On February 13, 2003, plaintiffs filed an amended complaint. Eleven days later, on February 24, they filed a motion for temporary restraining order requiring defendants to cease and desist from using and to remove the trailer they placed on the premises, and the appurtenant electrical system they installed, claiming both lacked the necessary permits. After an evidentiary hearing held on March 14, 2003, at

which he received the testimony of five witnesses, Judge Taft denied the motion. Finding "that the plaintiffs, probably through Mr. Odom, were making a concerted effort to terminate the lease on whatever basis they can," Judge Taft concluded that plaintiffs were "subject to laches [and the] defense of unclean hands."

At the conclusion of the March 14 hearing, plaintiffs' counsel called the court's attention to the fact that defendants had not filed an answer to the amended complaint filed on February 13, which was due that day. Counsel for defendants explained that they had not filed an answer because counsel for plaintiffs "has indicated that he wishes to amend the complaint again, and we have indicated to him that we would not oppose that motion." Judge Taft, who later said he was "getting tired of every week of having a motion before me," did not accept this explanation or the prospect of any further delay. Defendants' counsel therefore offered to promptly file an answer as well as "our cross-complaint." The court rejected the offer, stating: "What I'm going to do on the complaint, I'm going to deem all material allegations denied and all special defenses raised without the—without filing an answer. [¶] I'm going to set the matter for trial." Telling plaintiffs' counsel, "You're entitled to a preference on the calendar," the court set April 11, 2003 as the trial date. When counsel for defendants reminded Judge Taft that his clients intended to file a cross-complaint, and inquired whether he wanted to sever it from the trial on the complaint, which sought injunctive relief, Judge Taft replied: "As to the cross-complaint, I'm going to sever it because I'm going to have a trial on this, and the trial is going to be April 11."

On April 3, 2003, eight days before the date then set for trial, plaintiffs filed a motion to continue the trial to a date at least 90 days later than that scheduled, together with a

motion to leave to amend the first amended complaint. In support of the motion to reschedule the trial, plaintiffs argued that no statute or rule justified a precedence over all other cases on the civil calendar. Among other things, plaintiffs argued that the case was not an unlawful detainer action, and therefore not entitled to a "precedence over all other civil actions" under Code of Civil Procedure section 1179a,[3] as the trial court seemed to think. Plaintiffs also pointed out that, on March 14, the date the court ordered trial to commence on April 11, defendants had not yet filed either an answer to the complaint or the cross-complaint they indicated they would file, no party had sought a trial date, and the regular case management conference had not been held. Plaintiffs contended that, because defendants had not yet filed their answer and cross-complaint, they had justifiably deferred discovery in order "to effectuate economy in the discovery proceedings." Without such discovery, plaintiffs argued, they were unprepared for trial. Plaintiffs maintained that the court's "sua sponte setting of a trial date that is too close at hand to permit meaningful discovery ... [prevented them] from effectively exercising their right to produce evidence," and thus violated their right to due process under Article I, sections 7 and 15, of the California Constitution.

On the basis of an order shortening time, the hearing on the motions to reschedule trial and to allow further amendment of the complaint was held the same day the motions were filed. The motion for leave to amend was denied on the ground that the proposed amendments "do not add anything substantive to the first amended complaint sufficient to permit the delay inherent in such amendments and responses thereto." Judge Taft also denied the motion to

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[3] All subsequent statutory references are to the Code of Civil Procedure.

reschedule the trial, stating as follows: "The case has been pending for over four months, enough time to conduct discovery in such a case, and Plaintiffs have not suggested any specific due process rights which they have been denied by the setting of the current trial date. The court deems this matter to sound in unlawful detainer and injunctive relief, as demonstrated by Plaintiffs', and their counsel's actions during the pendency of the action, and as such has been given preference."

On April 9, 2003, Judge Taft conducted a conference with counsel at which he informed them that the trial he was then conducting in another case was going to take much longer than anticipated, and he would be unable to commence trial in this case until April 25th. On April 24th, Judge Taft conducted another conference at which he told counsel that trial could not begin the next day, as planned, because of a vacation he had scheduled, and that his courtroom had been assigned for use for a 15-day trial before an out-of-county judge appointed by the Judicial Council due to the recusal of all Solano County judges. After conferring with counsel, the court set July 18, 2003 as the new trial date. The court also ruled on the parties' in limine motions.

Plaintiffs' motions sought to preclude defendants from introducing evidence that plaintiffs sought unfair rent increases, imposed unfair utility charges, confronted defendants' dog training clients, and sought to deprive defendants of their right of first refusal to purchase the property and their option to renew the lease. Plaintiffs maintained that this and related evidence was not related to the claims set forth in the complaint and should be confirmed to the cross-complaint defendants intended to but had not yet filed. The court denied these motions, but did grant plaintiffs' motion to exclude evidence of news stories related to Schutzhund training.

Defendants' in limine motions to preclude plaintiffs from introducing evidence relating to defendants' unpermitted electrical work on the premises and their lack of insurance were both denied.

For reasons that do not appear in the record, trial did not commence on July 18, the date set, but on July 22. At the close of trial on July 30, 2003, Judge Taft granted defendants' motion for nonsuit as to all causes of action save the third, for breach of contract, and the fourth and fifth, for different trespasses, and also struck the claim for punitive damages. Because the issues we consider it necessary to address do not relate to the conduct of the trial, and there is no claim that the judgment is unsupported by the evidence, we find it unnecessary to summarize the testimony of the 19 witnesses who testified (12 for plaintiffs and seven for defendants), and the other evidence received by the court. Suffice it to say that the chief factual issues presented were the meaning of the lease agreement, whether the parties agreed to the modifications desired in the addendum to the agreement, whether the defendants' conduct violated the terms of the lease and, in the event the jury found one or more violations, the damages, if any plaintiffs were entitled to receive. More precisely, the questions were whether defendants' placement on the leased premises of the 33-foot trailer was consistent with the lease agreement, whether plaintiffs were aware of and acceded to the unpermitted electrical work performed by defendants on the property, and whether a gravel-based chain link fence defendants installed extended over property not covered by the lease. Deciding these questions in favor of defendants, the jury returned a verdict finding no breach of contract or trespass. Judgment in favor of defendants was entered on July 31, 2003.

Plaintiffs filed a timely notice of appeal from the judgment on August 13, 2003.

On November 6, 2003, more than three months after entry of judgment, defendants filed a "first amended cross-complaint"[4] against plaintiffs, their son-in-law Ken Odom, and Patrick Dwyer, one of plaintiffs' attorneys, alleging causes of action for breach of contract, breach of the covenant of good faith and fair dealing, intentional misrepresentation, intentional interference with contractual relationships, intentional interference with prospective economic advantage, abuse of process, intentional infliction of emotional distress, and slander, seeking not only general, special and punitive damages, but also reformation of the lease agreement and an order enjoining plaintiffs and Odom and their agents from entering the leased premises without written permission. Plaintiffs moved to strike the cross-complaint and demurred to the pleading in the event the motion to strike was denied. Both the motion and the demurrer relied on the facts that the cross-complaint was not filed before or at the same time as the answer to the complaint, was not only against plaintiffs, and was not filed with leave of the court, as required by section 428.50, subdivisions (a) and (b). Defendants responded that section 428.50 did not bar their cross-complaint because, by relieving them of the need to file an answer, Judge Taft also relieved them of the duty to file their cross-complaint "before or at the same time as the answer," as would otherwise be required by subdivision (a) of section 428.50.

Plaintiffs' motion to strike the cross-complaint and demurrer was heard by Judge Harry S. Kinnicut on April 21, 2004. prior to the hearing, Judge Kinnicut issued a tentative ruling granting the motion to strike the cross-complaint without leave to amend. On May 5, 2004, after considering the arguments advanced by the parties at the hearing, Judge

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[4] There is no indication in the record of any prior cross-complaint having been filed.

Kinnicut reaffirmed his tentative ruling and issued an order granting plaintiffs' motion to strike the cross-complaint in its entirety, rendering the demurrer moot. His reasoning was set forth in the order as follows; "Code of Civil Procedure section 428.50 requires a cross-complainant [*sic*] against a plaintiff be filed no later than 'during the course of action,' which ends upon entry of judgment. *City of Hanford v. Superior Court* (1989) 208 Cal.App.3d 580. Cross-complainant mentioned the possibility of a cross-complaint [at the March 14, 2003 hearing before Judge Taft], which the judge said would be severed, but cross-complainant still had a duty to file it before judgment was entered. [¶] Finally, this cross-complaint was filed without leave of court, months after the case ended in judgment against the only parties to it, thus leaving this court without jurisdiction over any new claims attempted to be filed in it."

Defendants filed a timely notice of appeal and we thereafter consolidated their appeal with that previously commenced by plaintiffs.

DISCUSSION
Appeal No. A103827

The chief claims advanced on appeal by plaintiffs are that (1) the setting of trial in this case on the basis of a calendar preference not sought by any party was statutorily unauthorized, and (2) the effect of the preference was to deny plaintiffs meaningful discovery and, therefore, their constitutional right to a fair hearing. We believe these claims have merit and, accordingly, shall reverse the judgment and remand the matter for retrial.

I.

The propriety of the grant of a statutory calendar preference presents a question of law: we therefore decide the issue independently. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

At the time Judge Taft placed this case on the trial calendar, no party had asked that the case be set for trial, the regularly scheduled case management conference had not yet taken place, and, as plaintiffs explained, the date set by the court would effectively cut off discovery, which neither party had yet commenced. Judge Taft rejected these objections. Denying plaintiffs' motion to continue the April 11 date, he found that four months was enough time to conduct discovery in the case, and stated that because "[t]he court deems this matter to sound in unlawful detainer and injunctive relief, ...[it] has been given preference."

The preference statutes Judge Taft apparently relied upon are section 1179a, which relates to unlawful detainer actions, and section 527, subdivision (e), which relates to hearings on orders to show cause why a preliminary injunction or temporary restraining order should not be granted. Neither statute supports the court's ruling.

Section 1179a provides: "In all proceedings brought to recover the possession of real property pursuant to the provision of this chapter [i.e., summary proceedings for unlawful detainer,] all courts ...shall give such actions preference over all other civil actions therein, except actions to which special precedence is given by law, in the matter of the setting of the same for hearing or trial, and in hearing the same, to the end that all such actions shall be quickly heard and determined."

The complaint in this case alleged breach of contract and trespass. The trial that was had on those claims clearly was not the type of summary proceeding to obtain possession of land to which section 1179a applies. Indisputably, plaintiffs had a tenable action for breach of contract. "A lease is a contract. (*Medico-Dental etc. Co. v. Horton & Converse* (1942) 21 Cal.2d 411, 418-419.) Its breach will give rise to a claim for contract damages. (4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 575, p. 752 ['The measure of damages for breach of a lease is that established by [Civil Code section] 3300 for breach of contract'].) When a lessee breaches a lease, '[t]he lessor may recover, in addition to past and future rentals ... "Any other amount necessary to compensate the lessor for all the detriment proximately caused by the lessee's failure to perform his obligations under the lease or which in the ordinary course of things would be likely to result therefrom." [(Civ. Code, §] 1951.2, subd. (a)(4).) This is the ordinary rule of damages for breach of contract under [Civil Code section} 3300.... [¶] Examples of such damages are the lessor's reasonable expenses in retaking possession of the property, in making repairs that the lessee was obligated to make, in preparing the property for reletting, and in reletting; also damages for the lessee's breach of covenants, such as a covenant to maintain or repair the premises, or a covenant to restore them on termination of the lease. (Law Rev. Com. Comment to [Civ. Code, §] 1951.2.) [Citation.]' (4 Witkin, Summary of Cal. Law, *supra*, Real Property, § 679, p. 867 ....)" (*Old Republic Ins. Co. v Superior Court* (1998) 66 Cal.App.4th 128, 147-148, italics omitted, overruled on other grounds in *Vandenburg v. Superior Court* (1999) 21 Cal.4th 815, 841, fn. 13.)

Plaintiffs also alleged a facially tenable cause of action for trespass, which is an unlawful interference with possession of property. (*Girard v. Ball* (1981) 125

Cal.App.3d 772, 788.) " '[A] trespass may occur if the party entering [land] pursuant to a limited consent, i.e., limited as to purpose or place, proceeds to exceed those limits by divergent conduct on the land of another. "A conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with." [Citations.] Moreover, section 160 of the Restatement Second of Torts provides in pertinent part: 'A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor or his predecessor in legal interest has placed on the land [¶] '(a) with the consent of the person then in possession of the land, if the actor fails to remove it after the consent has been effectively terminated, ...' " (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1141-1142, fn. omitted.)

Ordinarily the form of the action appropriate to a case such as this, other than unlawful detainer, will be either contract or tort, but not both. As has been stated, in some situations "the same wrongful act may constitute both a breach of contract (or ground for its rescission) and the invasion of an interest protected by the law of torts. It would seem to be the privilege of the injured party to bring either type of action, or to file one suit pleading both causes of action in separate counts, whenever it would be to his advantage to do so. Of course, he would be required to elect, at some stage, between inconsistent remedies, and would not be entitled to a double recovery. [Citation.] But, subject to these limitations, there generally appears to be no objection on principle to the plaintiff suing either in contract or in tort [citation], at his election." (3 Witkin, Cal. Procedure (4th ed. 1996) Actions § 139, pp. 203-204.)[5]

[5] At the close of trial in the present case, the court informed plaintiffs that "you've got the same factual situation giving rise to a tort claim [and] a contract claim[,] which I think requires an election." The court permitted both types of claims to be presented to the jury, and

Just as a plaintiff claiming the violation of a lease may elect to sue either in contract or in tort, so too does he or she have the privilege to elect the remedy of unlawful detainer, as an alternative to either a contract or tort action. Whether a contract or tort claim "sounds" in unlawful detainer is an interesting question (see *Fragomeno v. Insurance Co. of the West* (1989) 207 Cal.App.3d 822, 830-831, overruled on other grounds in *Vandenburg v. Superior Court, supra*, 21 Cal.4th at p. 841, fn. 13), but it is not one we think it necessary to decide. For our purposes, the significant difference is procedural. Unlike the trial of contract and tort actions, unlawful detainer actions are *summary proceedings*. The time periods for pleading and service are shorter, the period for setting the matter for trial is likewise shorter, and several expeditious enforcement procedures are provided, in addition to priority on the trial calendar. (See 4 Witkin, Summary of Cal. Law (9th ed. 2004) Real Property §§ 706, 707, 711, 712.) For example, the tenant in an unlawful detainer action has only five days after the summons is served to answer or demur (§§ 1167, 1167.3), and unless the tenant surrenders possession, he or she is generally not permitted to file a cross-complaint. (See *Medford v. Superior Court* (1983) 140 Cal.App.3d 236, 239.) "It is well-established an action for unlawful detainer can co-exist with other causes of action in the same complaint *so long as the entire case is treated as an ordinary civil action, not as a summary proceeding.*" (*Lynch & Freytag v. Cooper* (1990) 218 Cal.App.3d 603, 608, italics added.)

Plaintiffs never sought to convert their action into an unlawful detainer proceeding. Had they done so defendants, who made it clear they intended to file a cross-complaint, would doubtless have objected vigorously. Nor did the court

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defendants agreed, because use of a general verdict would permit the court to insure plaintiffs would not receive double damages in the event they prevailed on both claims.

order the case to be tried as an unlawful detainer action, and it clearly was not tried as such. What the court did was to treat the case as an unlawful detainer action *for no purpose other than giving it an unsought preference over other civil actions*. Trial judges have considerable discretion to move cases expeditiously to trial, but they do not have roving authority to treat an ordinary civil action as an unlawful detainer action for the limited purpose of giving it precedence over other civil actions. If permitted, the unspecified exercise of such a broad judicial power might easily wreak havoc with the administration of civil justice.[6]

Defendants do not defend the trial court's granting of a preference on the theory that it "sounds in unlawful detainer." They argue instead, as they did in the trial court, that the case was entitled to a preference under section 527, subdivision (e). That statute is, however, manifestly inapplicable.

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[6] Section 36, subdivision (1) through (e), provide judicial discretion to grant motions for preference in a civil case in the interests of justice *only* where the movant "reaches the age of 70," or "suffers from an illness or condition raising substantial medical doubt of survival of that party beyond six months," or upon "a showing of cause which satisfies the court that the interests of justice will be served by granting such preference." None of the necessary showings, or even a motion, was made in this case, and the court never relied upon section 36 or indicated how "the interests of justice will be served by granting the preference." (§ 36, subd. (d).)

It is worth pointing out, however, that cases suggest that granting a request for a trial preference under section 36 might violate the due process rights of the other party if it did not provide him or her adequate time to prepare for trial. (*Peters v. Superior Court* (1989) 212 Cal.App.3d 218, 227; see also *Roe v. Superior Court* (1990) 224 Cal.App.3d 642, 643-644, fn. 2; *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*(1995) 37 Cal.App.4th 855, 867-868.)

Subdivision (e) of section 527 states that, in response to an order to show cause why a preliminary injunction or temporary restraining order should not be granted, the opposing party may present affidavits, and if they are served on the applicant at least two days prior to the hearing, "the applicant shall not be entitled to any continuance on account thereof." The statute continues: "On the day the order is made returnable, the hearing shall take precedence over all other matters on the calendar of the day, except older matters of the same character, and matters to which special precedence may be given by law. When the cause is at issue it shall be set for trial at the earliest possible date and shall take precedence over all other cases, except older matters of the same character, and matters to which special precedence may be given by law."

The word "cause" in the last sentence of subdivision (e) does not refer to the trial on the merits of legal claims. As Witkin points out, section 527, subdivision (e), "deals only with the time for hearing specified in an ex parte order to show cause, which is 15 days (or 22 days for good cause shown) from its issuance [citation]." (6 Witkin, Cal. Procedure, *supra*, Provisional Remedies, § 372, p. 303.) Such a hearing took place on March 14, 2003, when Judge Taft conducted an evidentiary hearing on plaintiffs' final effort to obtain a temporary restraining order, at which he received the testimony of five witnesses. Judge Taft refused to grant a restraining order, but he left plaintiffs' claims for breach of contract and trespass for determination by the jury at trial. Clearly, that trial was not entitled to a calendar preference under subdivision (e) of section 527.

II.

One of the effects of Judge Taft's sudden order placing the case on the trial calendar was to cut off

discovery. Unlike unlawful detainer proceedings, "in which discovery shall be completed on or before the *fifth* day before the date set for trial" (§ 2024, subd. (c), italics added), parties to an ordinary civil proceeding are entitled as a matter of right to complete discovery proceedings on or before the *30th* day before the date set for trial. (§ 2024, subd. (a), italics added.) As defendants acknowledge, the order setting trial in 30 days immediately cut off any further discovery. For several reasons, plaintiffs had conducted no discovery prior to March 14, 2003. For one thing, they were then preoccupied with their several efforts to obtain injunctive relief, with the need to contest defendants' motion to strike the complaint and demurrer, and with amending the complaint, as required by the court's granting of the demurrer in part. Their failure to have initiated discovery earlier was also due to the facts that defendants had not yet filed an answer and had expressed the intention to file a cross-complaint. As plaintiffs told Judge Taft, they felt it would "effectuate economy in the discovery proceedings" to await receipt of the answer and cross-complaint.

Section 2017, subdivision (1) provides: "Unless otherwise limited by order of court in accordance with this article [i.e., sections 2016 through 2036.5] any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action...if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." Though the order setting the case for trial appears to have been made solely for the purpose of expediting trial, its most significant effect was to preclude virtually any discovery. However, the limitation on discovery was not achieved in a manner authorized by any of the discovery provisions of the Code of Civil Procedure. Defendants never complained that plaintiffs' failure to initiate discovery earlier was dilatory or otherwise

objectionable, nor does the record show it to have been. The court 's denial of plaintiffs' motion to reschedule the trial on the ground that four months was "enough time to conduct discovery" begs the real question. The issue is not whether "over four months was enough time to conduct discovery" in a case such as this, as the trial court concluded, but whether plaintiffs' failure to have completed it during that period warranted the extreme sanction of preventing any further discovery. The court never made that inquiry, and the record provides no reason to think that plaintiffs' conduct warranted such a sanction. The peremptory setting of trial in a manner that effectively deprived plaintiffs of pretrial discovery was error. We turn to the question whether it requires reversal.

III.

"A judgment may not be reversed on appeal, ...unless 'after an examination of the entire cause, including the evidence,' it appears the error caused a 'miscarriage of justice.' (Cal. Const., art. VI, § 13.) When the error is of state law only, it generally does not warrant reversal unless there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached. (*People v. Watson* (1956) 46 Cal.2d 818, 835.)" (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.)

Plaintiffs argue that the denial of discovery—particularly the right to depose defendants and their expert witnesses—made it impossible for them to effectively present convincing evidence. Such a denial of the right to produce evidence, they say, is a violation of due process requiring reversal. Relying primarily on *Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, plaintiffs maintain that a per se reversible error standard applies. *Judith P.* was a dependency case in which it was held that

the failure to provide the mother a status report recommending termination of reunification services at least 10 days before the status review hearing, as required by statute, was per se reversible error absent either a continued hearing or an express waiver. Applying the analysis adopted by the United States Supreme Court in *Arizona v. Fulminante* (1991) 499 U.S. 279, the *Judith P.* court concluded that the stage at which constitutional error occurs determines whether it is "trial" or "structural" error, and therefore the applicable standard of error. " 'Trial error' is error that occurs *during the presentation of the case.* (*Arizona v. Fulminante, supra*, 499 U.S. at p. 307.) An error that occurs during the trial process itself does not require automatic reversal because a court may quantitatively assess such error in the context of other evidence presented in order to determine whether the error was harmless beyond a reasonable doubt. (*Id.* at pp. 307-308.) [¶] In contrast 'structural' errors involve ' " basic protections, [without which] a criminal trial cannot reliably serve its function as a *vehicle* for determination of guilt or innocence, and no criminal punishment may be regarded as *fundamentally fair.*" *(Arizona v. Fulminante, supra,* 499 U.S. at p. 310, italics added.) Examples of such structural errors that result in automatic reversal (the per se reversible error standard) include total deprivation of the right to counsel at trial, a biased judge, unlawful exclusion of members of the defendants' race from a grand jury, denial of the right to self-representation at trial, denial of the right to a public trial, and an erroneous reasonable doubt instruction to the jury. (*Id.* at pp. 309-310.)" *(Judith P. v. Superior Court, supra*, 102 Cal.App.4th at pp. 555-556.) The per se reversal is justified in these and other situations because, "[u]nlike erroneous admission of evidence or improper instructions, which can be reviewed in light of the evidence or instructions as a whole, the impact of having less than the statutorily mandated minimum time within which to ...contact

witnesses, ...obtain documents, ...prepare for examination and cross-examination, and ...hone one's arguments, is impossible for either a trial court or an appellate court to assess." (*Id.* at p. 557.)

It is true that the dependency process must pass constitutional muster because it can operate to deprive individuals of their constitutional right to parent or to be raised by their families of origin, and that no analogous constitutional right is ordinarily at play in litigation such as this over the meaning of a lease agreement. Nevertheless, California courts have expressed concern that the setting of a trial date that deprives a party of the state law right to meaningful discovery may in and of itself violate the plaintiff's right to due process of law. (See, e.g. *Lafayette Morehouse, Inc. v. Chronicle Publishing Co., supra*, 37 Cal.App.4th at pp. 867-868; see also, *Peters v. Superior Court, supra*, 212 Cal.App.3d at p. 227; *Roe v. Superior Court, supra*, 224 Cal.App.3d at pp 643-644, fn. 2.) Furthermore, due to the difficulty of assessing the prejudicial effect of structural error, our courts have applied the reversible per se rule without finding it necessary to decide whether the error adversely effects a constitutional right other than that of due process. (See, e.g., *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 677; *Guardianship of Waite* (1939) 14 Cal.2d 727,729; *Caldwell v. Caldwell* (1962) 204 Cal.App.2d 819, 821.)

For example, in *Kelly v. New West Financial Savings, supra* 49 Cal.App.4th 659, the trial court erroneously granted in limine motions precluding the plaintiffs and their witnesses, including an expert witness, from producing certain evidence. The effect of granting the motions, the Court of Appeal explained, "was to prevent plaintiffs from offering evidence to establish their case, *meaning the error is reversible per se.* It would be a further

miscarriage of justice were we to conclude otherwise. Because of the court's preclusion, we have nothing more than evidence referenced in argument on the motions and plaintiffs' brief opening statement of the nature and extent of the evidence plaintiffs' counsel would have been able to present during the trial. The record supports an inference that plaintiffs were injured as a result of a misleveling problem with one of the elevators and that respondents did have knowledge that such problem existed." (*Id.* at p. 667, italics added.)

In the present case, in support of their motion to continue the trial date, plaintiffs emphasized that the order setting trial in 30 days would require them "to present their case with their hands tied behind their backs."[7] Without the depositions of defendants and many of their witnesses, plaintiffs claimed, they would be unable to adequately present their case and prepare for the examination and cross-examination of their and defendants' most important witnesses. Though trial in this case did not commence in 30 days, as Judge Taft intended when he made his ruling of March 14, 2003, but instead on July 22, the parties agree that the effect of the March 14 order was to cut off essentially all discovery between March 14 and July 22, the day trial actually commenced. So far as the record discloses, the only deposition taken of any witness in this case was that of Hans Freitag, a German citizen who was one of the three expert witnesses allowed to testify for defendants despite the fact that they were not on defendants' witness list. Judge Taft denied plaintiffs' requests to depose two of the newly identified witnesses, but did order Freitag to submit to deposition (apparently because he lived in Germany and

[7] Defendants do not genuinely dispute plaintiffs' claim of prejudice. Their position appears to be that the calendar preference was justified under section 527, subdivision (e), whether or not plaintiffs were prejudiced.

could not easily have been deposed prior to March 14, 2003), and Freitag was deposed by plaintiffs the day before trial commenced.

The testimony of the many expert witnesses presented in this case was obviously of great significance. It is difficult to imagine that plaintiffs inability to depose all but one of these witnesses was not prejudicial, particularly in light of the trial court's denial of most of their in limine motions to limit the evidence.[8] Plaintiffs were not alone in fearing surprise from the testimony of opposing witnesses. In his opening statement, defendants ' counsel told the jury: "I don't think anybody can be certain of what the evidence is going to show. This case developed very quickly. Um, a lot of the things that happen in cases normally, such as depositions, where you really know what a witness is going to say, did not happen in this case."

Because it effectively barred them from engaging in the basic discovery essential to effective trial preparation, the unsought and wholly unexpected order setting the case for trial in 30 days deprived plaintiffs of the right to a fair trial. For that reason, and because the effect of the court's erroneous denial of discovery cannot be assessed reliably, the judgment is reversible per se. We deem it unnecessary to discuss plaintiffs' subsidiary claims, as they are either

[8] Most of the evidence plaintiffs unsuccessfully sought to exclude appears more relevant to the claims set forth in defendants' postjudgment cross-complaint than to those alleged in the complaint.

unlikely to arise on retrial, [9] or moot, [10] or manifestly unsupported by the record.[11]

Appeal No. A106673

Defendants appeal is from Judge Kinnicut's order of April 28, 2003, granting plaintiffs' motion to strike their postjudgment cross-complaint.

As previously noted, in reliance on *City of Hanford v. Superior Court, supra*, 208 Cal.App.3d 580, Judge Kinnicut struck the cross-complaint on the ground that "section 428.50 requires a cross-complainant [sic] against a plaintiff be filed no later than 'during the course of the action,' which ends upon entry of judgment." In Judge Kinnicut's view,

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[9] Plaintiffs claim the granting of nonsuit on four causes of action is reversible error. However, even assuming defendants move at retrial for nonsuit of the same causes of action, the availability of pretrial discovery makes it unlikely the evidence relating to those causes of action will be the same.

[10] Plaintiffs' claim that denial of their pretrial motion for a restraining order constituted judicial nullification of public law. However, the claims made and the relief sought by the denied motion were identical to claims and relief sought in the complaint. "It has been held that where preliminary injunction is denied and later after a hearing on the merits, a final judgment denying the injunction is made, the order denying the preliminary injunction is merged in the final order, and the appeal from the order denying the injunction pendente lite becomes moot. [Citations.]: (*Pahl v. Riberto* (1961) 193 Cal.App.2d 154, 160-161.)

[11] Plaintiffs' third subsidiary claim is that the trial court's denial of their pretrial motions to exclude certain types of evidence was reversible error. However, even if we were to assume the rulings were erroneous, plaintiffs have not explained their prejudicial effect. The final subsidiary claim, that the rulings of the trial court were the product of judicial bias, is unsupported by the record. To be sure, the rulings in question may be seen as reflecting an excessive judicial predilection to speed up the trial of this case, but the record does not show this attitude was inspired by a bias against plaintiffs.

Judge Taft's order of March 14, 2003 relieving defendants of the need to file an answer and severing the cross-complaint did not relieve defendants of the duty to file their cross-complaint before judgment was entered.

Defendants claim Judge Kinnicut erred. Their position, as succinctly stated in their opening brief, is that Judge Taft "clearly anticipated that this case would proceed in exactly the manner in which it has proceeded: the Terrys' case against the Levens was to be tried first; the cross-complaint by the Levens against the Terrys was severed and was to be litigated later." Defendants reason that statutory requirement that a cross-complaint be filed "before or at the same time as the answer to the complaint" became inapplicable, as did *City of Hanford v. Superior Court*, when Judge Taft relieved them of the need to file an answer.

We think it highly questionable whether section 428.50 contemplates or permits the filing of a postjudgment cross-complaint, and *City of Hanford v. Superior Court, supra*, certainly does not. [12] On the other hand, defendants'

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[12] In *City of Hanford v. Superior Court, supra*, 208 Cal.App.3d 580, a city petitioned for a writ of prohibition or mandamus directing the trial court to vacate its order allowing a power company leave to file a cross-complaint and other relief. The city and the power company had together successfully defended earlier consolidated actions against them by environmental groups seeking to halt construction of a cogeneration project planned by the power company and approved by the city. After entry of judgment, the environmental groups appealed, and the city, upon reconsideration of its earlier decision, enacted a moratorium against issuance of the permits necessary for the project to proceed. The trial court granted the power plant leave to file a cross-complaint challenging the moratorium, finding that it was a continuation of the earlier action. The Court of Appeal issued the writ, holding that the earlier action had concluded when judgment was entered, and therefore the purported cross-complaint could not be maintained. As the court stated, "permitting leave to file a cross-complaint after judgment has been entered on the

statement that Judge Taft wanted this case to proceed as it did seems to be correct. Defendants did not ask the court to accord this case a preference on the trial calendar or, after it did so, to relieve them of the need to answer the complaint. It was only after the trial court peremptorily set a quick trial date that defendants suggested the possibility of severing the cross-complaint, apparently believing that might be the only way to preserve their ability to file a cross-complaint at all. It is true that defendants could have filed an answer prior to trial. However, by "deem[ing] all material allegations [of the complaint] denied and all special defenses raised without ...filing an answer," Judge Taft seemingly relieved defendants of the need to actually file an answer. In short, defendants may have been as prejudiced by the trial court's erroneous acceleration of trial as plaintiffs.

Be remanding this case for a new trial we reestablish the situation that existed prior to Judge Taft's erroneous acceleration of trial, effectively rendering moot the issue decided by Judge Kinnicut. Plaintiffs will have a fresh opportunity to try their claims. Defendants will need to file an answer and may file a cross-complaint at or before the time their answer is due. It would be wholly unjust to

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complaint does not further the purpose for cross-complaints .... The reason for allowing cross-complaints is to have a complete determination of controversy among the parties in one action, thus avoiding circuitry of action and duplication of time and effort. [Citations.] While it makes sense to join multiple causes of action at the outset in order to permit efficient resolution of a controversy, it makes no sense to add new causes of action to a controversy which as been resolved and the result of which cannot be altered by any issue raised in the new pleading. [¶] Second, a judgment is the final determination in the trial court of the rights of the parties in an action or proceeding. (§ 577.) Thus, entry of judgment on the original complaints was a final resolution in the trial court of the issues therein between [the parties]." (*City of Hanford*, at pp. 587-588.)

The only significant difference between *City of Hanford* and this case is that in this case, as we point out, the trial court helped create the problem.

provide plaintiffs immunity from a cross-complaint, as that is among the burdens a plaintiff must ordinarily bear at trial.

DISPOSITION

The judgment is reversed and the matter remanded to the trial court for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal. [13]

/ S /
Kline, P.J.

We concur:

/ S /
Haerle, J.

/ S /
Ruvolo, J.

A103827, A106673, *Terry e al v. Levens et al.*

[13] Defendants request that we take judicial notice of a tentative ruling of the Solano County Superior Court in a related case (*Levens v. Terry*, Super. Ct. No. FCS024141) is denied.

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 2

CLYDE TERRY, et al.,
Plaintiffs and Respondents,
v.
ALAN LEVENS, et al.,
Defendants and Appellants.

A106673 & A103827
Solano County No. 21093

BY THE COURT;

The petition for rehearing is denied.

Date: February 23, 2005 KLINE, P.J.

IN THE SUPREME COURT OF CALIFORNIA

Appellate Case No. A103827
Appeal from the Superior Court for Solano County
Franklin R. Taft, Judge
Superior Court Case No. FCS021093
Clyde Terry, Anne Terry,
Plaintiffs and Appellants
v.
Alan Levens, Karen Levens, Defendants and Respondents

Appellate Case No. A106673
Appeal from the Superior Court for Solano County
Harry S. Kinnicutt, Judge
Superior Court Case No. FCS021093
Alan Levens, Karen Levens,
Cross-Plaintiffs and Appellants,
v.
Clyde Terry, Anne Terry,
Kenny Wayne Odom,
Patrick H. Dwyer,
Cross-Defendants and Respondents.

PETITION FOR REVIEW

After a Decision by the Court of Appeal
First Appellate District, Division Two
Petition for Rehearing Denied

Patrick H. Dwyer,
Attorney for Plaintiffs and Appellants in A103827
and Appearing Pro Se in A106673
March 4, 2005

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I. Issues Presented

A. Did the Court of Appeal Exceed its Jurisdiction By Reviewing a Trial Court Order From Which An Appeal Was Never Taken?

B. Did the Court of Appeal Nullify California Civil Code of Procedure §428.50 by Allowing a Cross Complaint to be Filed After Entry of Final Judgement?

C. Did the Court of Appeal Violate Government Code §68081 By Failing to Grant a Petition for Rehearing On Issues Never Raised on Appeal and That Were Never Briefed?

D. Did the Court of Appeal Exceed its Jurisdiction by Ignoring the Judicial Rule Prohibiting Consolidation of Appellate Cases With No Common Issues?

E. Did the Court of Appeal Nullify California Rule of Court 27(a)(1) by Failing to Award Costs to the Prevailing Party?

II. Why Review Should Be Granted

This case presents five questions that are at the very heart of California appellate practice and procedure. The actions of the Court of Appeal ignored or nullified statutes and long standing judicial rules governing appellate review that are used daily by every appellate court in this state.

First, the ruling of the Court of Appeal ignored the statutory and judicial rules that limited the boundaries of its jurisdiction to the review of judgements or orders from which an appeal has been filed. California Code of Civil Procedure §906 expressly prohibits any appellate court from reviewing a decision or order from which an appeal has not been taken. This statute is, in substantial part, a codification of the long standing and universal judicial rule that a party who has not filed an appeal or cross appeal from the judgement or order may not thereafter raise issues during the appellate process. The Court of Appeal, contrary to the express language of CCP §906, raised issues on appeal *sua sponte* and without briefing by any party that were determinative of its decision to render moot Appeal No. 106673 and allow a cross complaint to be filed upon reversal and remand in Appeal No. A103827.

Second, the Court of Appeal nullified the legislature's expressly stated rule for the timely filing of cross complaints set forth in California Civil Code of Procedure §428.50 by allowing a cross complaint to be filed without leave of court and after entry of final judgement. This decision is in direct conflict with the Court of Appeal, Fifth District decision in City of Hanford v. The Superior Court of Kings County (1989) 208 Cal. App. 3d 580 (hereafter "City of Hanford"), holding that CCP §428.50 forbids the filing of a cross complaint after the entry of final judgment.

Third, the Court of Appeal violated Government Code §68081 by refusing to grant a rehearing on issues that were never raised on appeal and, consequently, were never briefed. The Court of Appeals in its ruling on Appeal No. 106673 agreed with the trial court's granting of the motion to strike the cross complaint for failure to be timely filed under CCP §428.50, but then without explanation, ruled the decision moot and ordered that the cross complaint be filed upon remand of the original action.

Fourth, the Court of Appeal exceeded its jurisdiction by ignoring the rule enunciated by this Supreme Court prohibiting the consolidation of appellate cases where there are no common issues. Without notice to any party and without opportunity for briefing, the Court of Appeal consolidated two cases that did not have any common issues. The two appellate cases arose and were briefed independently. Appeal No. 103827, the appeal of the original action, dealt with whether the trial court erred by ordering the case to trial without allowing the plaintiffs any opportunity for discovery. Appeal No. 106673 dealt with the dismissal of a cross complaint that was filed after the entry of judgement and after the time for appeal in the original action. These cases had no common issues and should not have been consolidated.

Fifth, the Court of Appeal ignored the clear intent of California Rule of Court 27(a)(1) by failing to award costs to the prevailing party. Without any explanation or finding of any kind, the Court of Appeal simply decided that it would be fair for each party to bear their own costs. No consideration was given to the very large difference in costs between the two cases on appeal, and no consideration was given to the fact that the appellants in Appeal No. 103827 clearly prevailed and that the respondents in Appeal No. 106673 also prevailed on the merits, but that the *sua sponte*

rendering of the case moot nullified the award of costs that the respondents would have otherwise received.

III. Background

In April, 2001, the Terrys entered into a commercial lease with the Levens for a certain portion of their property in Dixon, California, for use as a dog kennel and obedience training facility. After over a year and a half of attempting to obtain the Levens' compliance with certain terms of the lease, the Terrys filed suit to terminate the lease in late November, 2002 (hereafter the "Original Action"). In February, 2003, the Terrys received from Solano County a Notice of Violation and Order to Comply concerning electrical wiring and a trailer that the Levens had installed on the leased premises without a permit and in violation of the lease. The County notice and order gave the Terrys just thirty days to have the wiring and trailer removed. Having tried unsuccessfully for nine months to get the electrical wiring and trailer removed, the Terrys had no choice but to file a motion for a temporary restraining order to enforce the Solano County Order.

On March 14, 2003, the trial court conducted the hearing on the TRO Motion. The Terrys presented their evidence respecting the hazardous electrical wiring and the illegal trailer. The Levens did not present any factual evidence to the rebut the presence of the illegal wiring and trailer or the finding of violation by Solano County, but instead, argued that the TRO was barred by laches and unclean hands. The trial court, without explanation, pronounced: "I'm going to set the matter for trial." Reporter's Transcript on Appeal ("RT") March 14, 2003, page 97, line 13. The trial court choose April 11, 2003, for the start of trial, which was less than thirty days away (hereafter "Trial Date Order"). The trial court then denied

the TRO motion on the grounds of laches and unclean hands. RT March 14, 2003, page 97, lines 14-23.[14] Counsel for the Levens then mentioned that the Levens contemplated filing a cross complaint. RT March 14, 2003, page 98, lines 25-28. The trial court responded "[a]s to the cross complaint, I'm going to sever it ..." RT March 14, 2003, page 99, lines 1-3 (hereafter "Severance Order).

At the pre-trial conference of April 9, 2003, the Terrys submitted a witness list, exhibits and trial brief as best they could without the benefit of discovery and in the short time allowed. At this hearing the trial court, *sua sponte,* moved the trial date to April 25, 2003. Then again at the April 24, 2003, pre-trial hearing, the trial court, *sua sponte*, re-set trial for July 21, 2003. However, at no time did the trial court allow for discovery.

Trial commenced on July 21, 2003, and at the conclusion of the Terrys' case in chief, the trial court granted the Levens' motion for nonsuit with respect to the First, Second, Sixth and Seventh Causes of Action. The granting of the nonsuit effectively gutted the Terrys' case and the jury returned a verdict in favor of the Levens on the remaining three lesser counts. The Terrys filed a notice of appeal on August 13, 2003. The Levens did not file any cross appeal.

On November 6, 2003, four months after appeal of the Original Action (No. A103827) and without making any motion for leave of court pursuant to CCP §428.50(c), the Levens filed a cross complaint in the Original Action. On December 31, 2003, the Terrys and other cross-defendants filed a Motion to Strike under CCP §435 on the grounds that the cross complaint had been filed without leave of court and

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[14] The Terrys argued that no factual basis for laches and unclean hands existed and that is was improper to bar enforcement of a county Notice of Violation and Order to Comply.

four months after entry of final judgement in direct violation of CCP §428.50(c). Judge Kinnicutt, who had replaced the just retired Judge Taft, granted the Motion to Strike without leave to amend on April 28, 2004. The Levens filed an appeal of Judge Kinnicutt's order of dismissal of the cross complaint on May 26, 2004 (hereafter "Cross Complaint Action", case no. A106673). There were only two grounds for appeal in the Levens' opening brief: (1) the cross complaint was not barred by CCP §428.50; and (2) the decision in City of Hanford, was not applicable. The Levens never argued that the Severance Order was improper or that they had been prejudiced thereby.

The briefing by all parties in both appeals was completed by August 24, 2004. Over the objection of the Terrys in the Original Action and Respondents in the Cross Complaint Action, the two cases were subsequently joined for purposes of oral argument. Oral Argument in the Court of Appeal was heard on December 13, 2004. The Court of Appeal issued its decision on February 3, 2005, reversing and remanding the Original Action. At the same time, the Court of Appeal reviewed Judge Kinnicutt's order of dismissal in the Cross Complaint Action and found the grounds for dismissal under CCP §428.50 were correct and that the decision in City of Hanford was sound, but that the case was moot. The Court of Appeal, without any reasoning other than the unsupported assertion that the Levens "may have been" prejudiced by the Severance Order, directed that the Levens be allowed to file their cross complaint upon remand of the Original Action. The Terrys and respondents in the Cross Complaint Action filed a petition for rehearing on February 18, 2005. The Court of Appeal denied the petition without further argument or hearing on February 23, 2005.

IV. Legal Discussion

A. The Court of Appeal Exceeded its Jurisdiction By Reviewing An Order From Which No Appeal Was Taken.

1. California Code of Civil Procedure §906 Bars Review of Decisions and Orders Not Timely Appealed.

The California Legislature defined the powers of appellate courts and the matters that are reviewable in CCP §906.[15] In the last sentence of this statute the legislature specified that the "provisions of this section do not authorize the reviewing court to review any decision or order from which an appeal might have been taken." In other words, if an aggrieved party does not timely file an appeal from the allegedly offending order or judgement, that party waives its right to appeal any such matter.

No appeal from the Severance Order was ever taken by the Levens in the Original Action. Then in the Cross Complaint Action the Levens never argued whether they had been prejudiced by the Severance Order. Rather, they argued that CCP §428.50 was not a bar to filing the cross complaint and that the City of Hanford decision was not applicable. There were two very good reasons for this approach by the Levens: (1) they had failed to file a cross

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[15] California Code of Civil Procedure §901 is the starting point for determining appellate review. CCP §901 expressly mandates that the "Judicial Council shall prescribe rules for the practice and procedure on appeal not inconsistent with the provisions of this title." Thus, the rules prescribed by the Judicial Council shall be consistent with CCP §906 which defines the powers of the reviewing court and what matters are reviewable.

appeal in the Original Action alleging that they had been prejudiced by the Severance Order as required by CCP §906; and (2) the Levens had over four months to file a cross complaint in the Original Action (about which they were reminded by the trial court on two occasions) but they never did. Thus, it was clear from the record in the Original Action that the Levens had not, in fact, been prejudiced by the Severance Order, and even if they had been, they had failed to timely take any action to correct or appeal from such prejudice.

The only logical explanation for the Levens' conduct in filing the Cross Complaint Action four months after the entry of final judgement in the Original Action is that the Levens never bothered to examine the rules for the filing of a cross complaint, namely CCP §428.50. The failure of a party to research the rules of civil procedure for when and how to file a cross complaint is not grounds for claiming that they had been prejudiced.

The first time that the alleged "issue" of whether the Levens "may have been" prejudiced by the Severance Order was when the Court of Appeal, sua sponte and without any factual or legal foundation, mentioned this new issue in its decision of February 3, 2005. Under the express and unequivocal language of CCP §906, the Court of Appeal had no jurisdiction to raise a new issue that had never been the subject of a timely appeal by the Levens. Therefore, the Court of Appeal's decision to allow the Levens to file the cross complaint upon remand of the Original Action was a judicial nullity that this Court must set aside as a *per se* error.

2. **California Judicial Authority Follows The Code of Civil Procedure §906 Bar of Review For Decisions and Orders Not Timely Appealed.**

The language of CCP §906 is really a codification of the long standing judicial rule that "a respondent who has not appealed from the judgement may not urge an error on appeal." Estate of Powell (2000) 83 Cal. App. 4th 1434, 1439, quoting from California State Employee's Association v. State Personnel Board (1986) 178 Cal. App. 3d 372, 382, fn. 7.[16] As pronounced by the California Supreme Court on multiple occasions, unless a respondent files a cross appeal from any order or judgment that he believes aggrieves or prejudices him, the respondent loses the right to argue that issue on appeal. Alexander S. a Minor, Mark H. et al. v. Tudor G. (1988) 44 Cal. 3d 857, 864-865; Puritan Leasing Company v. August et al. (1976) 16 Cal. 3d 451, 463.

The application of the foregoing judicial counterpart to CCP §906 leads to the same result: the Court of Appeal had no jurisdiction to raise on appeal for the first time an issue that the Levens had never raised in the trial court, in the appeal of the Original Action, or in the appeal of the Cross Complaint Action. The Levens, having taken no action in the trial court and having waived their rights on appeal, cannot now be allowed to file a cross complaint based upon an order from the Court of Appeal that was null and void.

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[16] See also, Transworld Systems, Inc. v. County of Sonoma (2000) 78 Cal. App. 4th 713, 716, fn. 4; Raymond Kardly et al. v. State Farm Mutual Automobile Insurance Company (1995) 31 Cal. App 4th 1746, 1749, fn.1.

3. California Rules of Court Follow the Code of Civil Procedure §906 Bar of Review For Decisions and Orders Not Timely Appealed.

The structure and language of the California Rules of Court ("CRC") is completely consistent with the express language of CCP §906 and the foregoing line of judicial decisions. CRC 1(e) defines the term "notice of appeal" as including a "notice of cross appeal" and that "appellant" includes a "respondent filing a notice of cross-appeal." Rule 2(a)(1) defines the time for filing an appeal, and hence, cross-appeal. Rule 3(e) expressly provides that a cross-appeal be filed within 20 days after the clerk mails the notice of the first appeal.

These rules of the CRC make perfect sense if, and only if, the foregoing statutory and judicial authority is correct: i.e., that a respondent must file a cross appeal from any order or judgement by which he is aggrieved. If this was not the rule, then there would be no sense whatsoever in this language of CRC Rule 1, 2, and 3 pertaining to the filing of a "cross-appeal." In other words, if a respondent could raise an issue arising from an order or judgement on appeal for the first time in his opposition brief without having filed a notice of cross-appeal, it would make the subject CRC Rules meaningless. The same reasoning applies to the actions of the Court of Appeal in raising the issue sua sponte, without any opportunity for briefing by the parties, and based solely upon the nebulous assertion that the Levens "may have been" prejudiced. The CRC should be construed in conjunction with CCP §901 and §906 to require the timely filing of a cross-appeal to establish jurisdiction in the Court of Appeals to hear an issue from a respondent.

4. **The "Interwoven" Exception to the Rule That A Cross-Appeal Must be Filed By An Aggrieved Party Is Not Applicable Because The Issue of Whether The Levens Were Prejudiced Is Not Inextricably "Interwoven" and "Identical" With The Issues Raised By Petitioners.**

In a civil context, there is one notable exception to the judicial rule that a cross-appeal must be filed or the issue is waived.[17] There is a line of California cases that carve out a narrow exception for a non-appealing party where "portions of a judgement adverse to a nonappealing party are inextricably interwoven with the whole judgement." In such case, "a general reversal may be ordered to do complete justice." Witkin, California Procedure, Fourth Edition, Appeal, §325.

The case that best explains the interwoven exception as it would apply to the facts at bar appears to be McDill v. Martin et al. (1975) 14 Cal. 3d 831, where the California Supreme Court held that the fact that one of two nieces did not appeal from an adverse judgement of the trial court erroneously awarding the decedent's estate would not preclude an appellate court from making an equal award to both nieces where "the issue presented by the appealing niece was interwoven with, and identical to, the issue which the nonappealing niece would have presented." McDill at 840.

There are three critical elements necessary to apply the McDill test. These are: (1) that the issue presented

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[17] The Petitioners note that these cases do not discuss the statutory rule CCP §906.

by the "appealing" party is "interwoven" with the un-appealed order or portion of a judgement; (2) that the issue raised by the "non-appealing" party is identical with the issue raised by the "appealing" party; and (3) it is not reasonably possible to sever the appealing party's issue from the non-appealing party's issue. In other words, the issue not raised by the non-appealing party must be interwoven and identical with the issue raised by the appealing party and not severable from a determination of the issue(s) presented by the appealing party.

This rule clearly does not apply to the case at bar. First, as discussed above, the issue of whether the Levens were prejudiced by the Severance Order is completely different from any of the issues raised on appeal by the Terrys. Second, the Severance Order is not "interwoven" with the Trial Date Order, the judgement entered in the Original Action, or with any of the issues raised by any of the parties on appeal, including those rased by the Levens. Third, the question of whether the Levens were in any way prejudiced by the Severance Order is clearly independent of any issues raised by the Terrys.

Analysis of the Court of Appeal decision confirms that the "interwoven" exception was not the basis for its decision. The Court of Appeal first dealt with the issues raised by the Terrys regarding the Original Action, primarily whether there were any statutory grounds for the Trial Date Order and whether the Trial Date Order, by accelerating the date of trial so as to cut off discovery, violated the Terrys' due process rights. The Court of Appeal then reviewed the decision by Judge Kinnicutt dismissing the cross complaint after entry of final judgement. The Court of Appeal reviewed the application of the language of CCP §428.50 to the filing of the cross complaint without leave of court four months after entry of final judgment and then discussed the holding in City of Hanford that a cross

complaint may not be filed after entry of judgment. The Court of Appeal concurred with Judge Kinnicutt that these authorities had been correctly applied.

The Court of Appeal never raised the "interwoven" exception. The reason for this was quite simple: there were no interrelated and/or identical issues that affected equally the appealing and non-appealing parties as required by the McDill test. The issues in the two appeals were completely different, they had been raised in separate appeals, and they affected the appealing and non-appealing parties completely differently. Thus, there was no basis for using the "interwoven" exception as the basis for an order to allow the cross complaint to be filed upon remand. Therefore, the interwoven exception cannot support the Court of Appeal decision.

B. The Court of Appeal Nullified California Civil Code of Procedure §428.50 by Allowing a Cross Complaint to be Filed After Entry of Final Judgement.

The only two issues that were raised in the Levens' briefs in Appeal No. 106673 from the order of Judge Kinnicutt dismissing the cross complaint as untimely filed were: (1) that the cross complaint was not barred by CCP §428.50; and (2) that the decision in City of Hanford was not applicable. The only discussion of the Severance Order was the Levens' argument that the cross complaint should be ante-dated to the date of the Severance Order under the *nunc pro tunc* rule of CCP §473(d). There was no argument that the Severance Order had "prejudiced" the Levens or that severance under CCP §1048 was improper or otherwise conflicted with CCP §428.50.

The reason that the Severance Order was never directly challenged by the Levens as "prejudicial" is simple: it was the Levens that requested that the trial court sever the cross complaint. See RT, March 14, 2003, page 97, lines 25-28. Further, as discussed above, the Levens had ample opportunity in the trial court to file a cross complaint (or challenge the Severance Order). They apparently just did not bother to look up the rules of civil procedure.

The Court of Appeal's analysis of the dismissal of the cross complaint tracks the exact reasoning used by Judge Kinnicutt. The Court of Appeal discussed CCP §428.50, and then acknowledged the sound reasoning of City of Hanford in interpreting this statute. Moreover, the Court of Appeal made no factual findings or legal argument to support its nebulous assertion that the Levens "may have been" prejudiced. For the Court of Appeal to then, *sua sponte*, decide to simply ignore all of the legal authority it had just confirmed and rule that the Cross Complaint Action was moot and order that a cross complaint be allowed upon remand, is the most clear example of judicial nullification that can be found.

As stated by the United States Supreme Court in Sorrells v. United States (1932) 287 U.S. 435, 450, 53 S.Ct. 210, 216, 77 L.Ed. 413, it is the duty of the courts in this nation to enforce the laws adopted by the legislature and that *judicial nullification*, for whatever reason that a court may harbor, is not permissible. The California Supreme Court has issued consistent opinions that judicial nullification is not to be tolerated in California Courts. In Santa Clara County Counsel Attorneys Association v. Woodside (1994) 7 Cal. 4th 525, at 540, the California Supreme Court held that:

> It appears elementary that courts may not frustrate the creation of a statutory duty by refusing to enforce it through normal judicial means. What public policy reasons are there against enforcement of a statutory duty are reasons against the creation of the duty *ab initio*, and should be addressed to the Legislature.

The Court of Appeal was obligated to follow the statutory rule of CCP §428.50 regardless of whether it liked the outcome. Its unsupported and unjustified refusal to do so must be reversed as *per se* error.

C. The Court of Appeal Violated Government Code §68081 By Failing to Grant a Petition for Rehearing On Issues Never Raised on Appeal and Never Briefed.

The issues surrounding the alleged prejudice that the Levens "may have" suffered as a consequence of the Severance Order, were never raised on appeal and were never briefed by the parties. This is a direct violation of Government Code §68081 and is automatic grounds for rehearing. California Casualty Insurance Company v. The Appellate Department of the Superior Court of Los Angeles County (1996) 46 Cal. App. 4th 1145, 1149.

The Petitioners filed a petition for rehearing on February 18, 2005, and the Court of Appeal denied the petition on February 23, 2005, without further argument as required by the statute.

Government Code 68081 is really a statutory expression of the due process requirement that a party be allowed a fair hearing. A fair hearing requires that a party be

allowed to present all of its arguments. Obviously, if the Petitioners were never allowed to brief the issue, they were denied a fair hearing. By failing to give the Petitioners an opportunity to be heard on such a critical issue to its decision, the Court of Appeal clearly violated the due process rights of the Petitioners under Article I, Sections 7 & 15 of the California Constitution and the due process clause of the United States Constitution as made applicable by the 14th Amendment.

D. The Court of Appeal Exceeded its Jurisdiction by Ignoring the Judicial Rule Prohibiting Consolidation of Appellate Cases With No Common Issues.

The California Supreme Court has made it clear that two cases on appeal with different issues should not be consolidated. Instead, there must be commonality of one or more issues. The commonality of parties to separate actions is not sufficient. See Pacific Legal Foundation et al. v. California Coastal Commission et al. (1982) 33 C3d 158, 165, fn3.

A review of the issues in each of the appeals consolidated by this Court reveals no commonality whatsoever. The fact that there were two separate orders from Judge Taft, one for acceleration of the trial date and one for severing the cross complaint, does not meet the test spelled out by the Supreme Court. Consequently, upon rehearing, the two appeals should have been decided independently of each other.

E. The Apportionment of Costs Was Unfair to Plaintiffs and Should be Corrected.

The Court of Appeal ruled that each party bear their own costs in both appeals. This is directly contrary to CRC Rule 27(a)(1) which awards costs to the prevailing party.

Under the Court of Appeal decision in the original action, the Terrys were unquestionably the prevailing party, and thus, under CRC 27(a)(1) the Terrys were entitled to an award of costs.

In the Court of Appeal decision on the dismissal of the cross complaint, the Court agreed with the ruling of Judge Kinnicutt that the cross complaint was not filed in accordance with CCP §428.50 or the City of Hanford decision, but then found the case to be moot. There is little question that, absent the erroneous ruling that the Cross Complaint Action was moot, the Terrys (and other respondents) would have been entitled to an award of costs.[18]

The Court's order that the parties bear their own costs in both cases is patently unfair and contrary to the express language of CRC 27(a)(1). The Court of Appeal made no argument whatsoever that there were any reasons for not granting costs under CRC Rule 27(a)(1). Absent some reasonable factual or legal basis that a different award

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[18] The costs incurred in the appeal of the original action were not inconsequential. There were numerous complex factual and legal issues that required the Reporter's and Clerk's Transcripts to include the entirety of the extensive file docket and trial proceedings. The costs on the appeal of the dismissal of the cross appeal were far less because there were only the filing fees and the cost of duplicating Judge Kinnicutt's decision and the motions and briefs concerning the motion to strike. If the Court thought that it was somehow just balancing the costs in one case against the other, it was clearly erroneous reasoning.

should be made in the interests of justice, the prevailing party rule should have been applied.

V. Conclusion

The decision of the Court of Appeals to allow the Levens to file a cross complaint upon remand violated the California Code of Civil Procedure, the California Government Code, The California Rules of Court, and long established judicial authority, all of which require that an aggrieved party timely file an appeal or waive the right to have the alleged error reviewed on appeal. These rules are premised upon the most fundamental policies concerning the administration of justice.

As the record shows, the Levens never claimed any prejudice from the Severance Order in the trial court, never made a motion for leave to file a cross complaint in four month period between the Severance Order and the entry of final judgment, never raised the issue on a cross appeal from the final judgement in the original action, and never raised the issue in their appeal from the judgement of dismissal of the cross complaint. Consequently, the Court of Appeal was without jurisdiction and had no power to order that the cross complaint be remanded with the Original Action. The only jurisdiction that the Court of Appeal had concerning the cross complaint was over the question as to whether it was timely filed under CCP §428.50. Its decision ignoring this jurisdictional limitation was an act of judicial nullification of the applicable statutory and judicial authority.

Even if there had been some basis for the jurisdiction of the Court of Appeal (e.g., by an extreme extension of the "interwoven" rule), the Court of Appeal had to grant the petition for rehearing as required by Government Code §68081 to allow these issues to be properly briefed and

argued. Its failure to abide by this statute was another act of judicial nullification and a violation of the due process rights of the Terrys (as appellants in the original action) and of the Terrys, Mr Odom and Mr. Dwyer (as respondents in the dismissal of the cross complaint).

The consolidation of the two appeals without proper notice and a fair opportunity to be heard was improper and ignored contrary judicial authority from the California Supreme Court. Further, it denied the Terrys and respondents in the Cross Complaint Action their due process right for an opportunity to argue the merits of a critical element in the Court of Appeal's decision allowing the filing of a cross complaint upon remand of the Original Action.

Petitioners realize that the underlying subject matter of this case (i.e., a dog kennel lease) is not important in the larger scheme of things. None of the parties wanted this case to go to such lengths or involve such expense of time and judicial resources. However, it was the substitution of the trial court's personal opinion in place of the Terry's due process rights that set this case off in the wrong direction. Although the trial court's *per se* due process violation has been corrected by the Court of Appeal, the case is still off track because the Court of Appeal has now substituted its own idea of a "fair" result in place of the express statutory and judicial rules governing appellate procedure. All that the Petitioners are asking for is that the existing statutory and judicial law be followed. There is no need for new law, novel interpretations, or the like: just the application of the state's existing rules of due process on appeal will get this case back on track and allow the matter to be settled according to the law.

Based upon the foregoing, Plaintiffs request that this Court grant this Petition for Hearing.

Respectfully Submitted,

_____

Patrick H. Dwyer,
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In Appeal 103827

and Appearing Pro Se
In Appeal 106673

March 4, 2005

Court of Appeal, First Appellate District, Division Two – Nos A103827/A106673

S 132017

IN THE SUPREME COURT OF CALIFORNIA
En Banc

CLYDE TERRY et al., Plaintiffs and Appellants,

v.

ALAN LEVENS et al., Defendants and Respondents;

Petitions for review DENIED

George, C.J., was absent and did not participate.

Filed: April 20, 2005

BAXTER
Acting Chief Justice

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CLYDE TERRY et al., Plaintiffs and Appellants, vs. ALAN LEVENS et al., Defendants and Respondents.	A103827 Solano County Superior Court No. FCS021093
ALAN LEVENS et al., Cross-Plaintiffs and Appellants, vs. CLYDE TERRY et al., Cross-Defendants and Respondents	A106673 Solano County Superior Court No. FCS021093

ANSWER TO PETITION FOR REVIEW
OF DECISION OF THE COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION TWO

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I.

BACKGROUND & SUMMARY OF THE CASE

The unpublished Court of Appeal decision in this case does not qualify for Supreme Court review under any of the criteria set forth in Rule of Court 28(b). In fact, these criteria are not even mentioned at any point in the Petition for Review.

In the trial court, this case was set for jury trial on an expedited basis before the complaint had been answered. The trial resulted in a unanimous verdict for defendants Alan and Karen Levens, responding parties in this Court, (hereinafter "the Levens") against plaintiffs Clyde and Ann Terry, petitioners in this Court (hereinafter "the Terrys"). Subsequently the Levens filed a cross-complaint against the Terrys and others. A motion to strike the cross-complaint was granted without leave to amend, on grounds that the cross-complaint was not timely, having been filed after judgment was entered in the underlying action.

The Terrys appealed from the judgment against them on their complaint. The Levens appealed from the order granting the motion to strike their cross-complaint, without leave to amend.

The Court of Appeal reversed the jury verdict in favor of the Levens on grounds that the trial judge had forced the case to trial too quickly. In reversing that judgment, the Court of Appeal noted the obvious: reversal of the judgment eliminated the grounds upon which the motion to strike the cross-complaint had been granted. Therefore, the appeal of the judgment on the cross-complaint was moot. On remand, the Levens will have the opportunity to pursue their cross-complaint.

Although the Levens firmly believe that the Court of Appeal decision reversing the jury verdict in their favor was wrong, they cannot in good conscience argue that decision meets any of the criteria set forth in Rule of Court 28(b) for Supreme Court review. The Terrys, on the other hand, ignore that Rule entirely. They not only seek review of the unpublished Court of Appeal ruling as it relates to the cross-complaint, but also of the Court of Appeal decisions consolidating the two appeals for oral argument, providing that the parties shall bear their own costs on appeal, and denying a rehearing. The Terrys do not even attempt to argue that the rulings on these issues meet any of the criteria for Supreme Court review, set forth in Rule of Court 28(b).

II.

ARGUMENT

A. THE COURT OF APPEAL DID NOT REVERSE ANY ORDER FROM WHICH NO APPEAL WAS TAKEN

In a classic "straw man" argument, the Terrys focused on the trial court statement of March 14, 2003 that "as to the cross-complaint, I'm going to severe it." RT (3/14/04) 98:1-2. The Terrys then claim that the Court of Appeal exceeded its jurisdiction by reversing this "order" which was never appealed.

The Levens never appealed the March 14, 2003 "order" because they agreed with it. In fact, they sought it, as the transcript of the hearing makes clear. What the Levens did appeal from was the subsequent order by another Judge striking their cross-complaint without leave to amend. Nowhere in their petition to this Court do the Terrys claim that the Court of Appeal was without jurisdiction to hear and

decide that appeal. That is, in fact, the appeal which was heard and decided.

The Terrys claim that the Court of Appeal should have heard the appeal regarding the cross-complaint in a vacuum, ignoring completely the inter-relationship between the two cases. There is no logic to this argument. It rests solely on the desperation of the Terrys to revive their case against the Levens, without subjecting themselves to counter-suit.

B. THE COURT OF APPEAL DECISION ALLOWING A CROSS-COMPLAINT TO BE FILED ON REMAND IS OBVIOUSLY RIGHT AND IS OF NO IMPORTANCE TO ANYONE UNINVOLVED IN THIS CASE.

The basis for the Terrys' motion to strike the Levens' cross-complaint, and the basis on which that motion was granted, was the argument that a cross-complaint cannot be filed after judgment in the underlying action has been entered. The judgment in the underlying action has not been reversed. This means, of course, that the argument for striking the cross-complaint is now entirely moot. As stated by the Court of Appeal:

> Plaintiffs will have a fresh opportunity to try their claims. Defendants will need to file an answer and may file a cross-complaint at or before the time their answer is due. It would be wholly unjust to provide plaintiffs immunity from a cross-complaint, as that is among the burdens a plaintiff must ordinarily bear at trial.

Not only is the logic of the Court of Appeal on this issue unassailable, the Terrys have not even attempted to argue that Supreme Court review of this issue is "necessary to secure uniformity of decision or to settle an important question of law." Since this is the only provision of Rule 28(b) which could possibly apply to this case, the Terrys have utterly failed to meet their burden on this petition.

C. THE COURT OF APPEAL RULINGS CONSOLIDATING ORAL ARGUMENT ON THE TWO APPEALS, PROVIDING THAT EACH PARTY BEAR ITS OWN COSTS ON APPEAL AND DENYING REHEARING WERE WITHIN THE COURT'S DISCRETION AND OF NO SIGNIFICANCE BEYOND THE PARAMETERS OF THIS CASE.

If the Supreme Court has ever granted review of a case in order to consider a Court of Appeal ruling consolidating hearings, awarding costs or refusing rehearing, the Terrys have not cited it and the Levens have not found it. These rulings were well within the Court of Appeal's discretion, were eminently reasonable and involve no conflict between Courts of Appeal on an unsettled question of law.

III.

CONCLUSION

The Supreme Court's role in the California judicial system "is to settle important questions of law." Powers v. City of Richmond (1995) 10 Cal 4th 85, 115, quoting Former Rule of Court 29(a), now rule 28(b). The Supreme Court "limits its review to issues of statewide importance." Southern California Chapter v. California Apprenticeship Council (1992) 4 Cal. 4th 422, 431. No such issue is involved in this case and the Court of Appeal rulings challenged by this Petition were logical, correct and well within that Court's discretion. Supreme Court review should be denied.

Dated: March 18, 2005

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